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5 UNITED STATES DISTRICT COURT
6 EASTERN DISTRICT OF WASHINGTON
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8 AMERICAN DENTAL MEDICAL)
9 TECHNOLOGY, LLC, a)
10 Washington Limited Liability)
11 Company,)

12 Plaintiff,

13 vs.

14 A.K. RUBBER PRODUCTS)
COMPANY, INC.,)

Defendant.)

No. CV-08-103-LRS

**ORDER GRANTING
MOTION TO TRANSFER,
INTER ALIA**

15 **BEFORE THE COURT** is the Defendant's Motion To Transfer Venue (Ct.
16 Rec. 25). This motion was heard with telephonic oral argument on December 23,
17 2008. Jeffrey C. Grant, Esq., argued on behalf of Plaintiff. C. Christine Burns,
18 Esq., argued on behalf of Defendant. Plaintiff's related motions to strike the
19 declaration of Bernie Stritzke (Ct. Rec. 47) and to strike the declaration of Thomas
20 Collopy (Ct. Rec. 63) have been considered without oral argument.
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23 **I. BACKGROUND**

24 This is a diversity action. Plaintiff, American Dental Medical Technology,
25 LLC ("ADMT"), is a corporation organized and existing under the laws of the State
26 of Washington, with its principal place of business in Spokane. A.K. Rubber
27 Products Company, Inc., ("A.K.") is a Wisconsin corporation with its principal
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1 place of business in Elkhorn, Wisconsin. The parties negotiated a contract in 2003
2 for A.K. to manufacture a dental tool handle designed by ADMT in Spokane.
3 ADMT alleges that A.K. breached the contract by manufacturing a defective
4 product.

5 A.K. now moves under 28 U.S.C. §1404(a) to transfer venue of this action to
6 the Eastern District of Wisconsin.

7 8 **II. DISCUSSION**

9 28 U.S.C. §1404(a) provides:

10 For the convenience of parties and witnesses, in the interest
11 of justice, a district court may transfer any civil action to any
other district or division where it might have been brought.

12 A district where the action "might have been brought" is one having subject
13 matter jurisdiction over the controversy, where defendants are subject to personal
14 jurisdiction, and where venue is proper. *Hoffman v. Blaski*, 363 U.S. 335, 343-44,
15 80 S.Ct. 1084, 1089-90 (1960). ADMT does not dispute that the Eastern District of
16 Wisconsin is a district where this action "might have been brought."

17 The moving party has the burden of proving that the "convenience of the
18 parties and the witnesses" and the "interest of justice" requires transfer to another
19 district. *Commodity Futures Trading Commission v. Savage*, 611 F.2d 270, 279
20 (9th Cir. 1979). A transfer will not be ordered if the result is merely to shift the
21 inconvenience from one party to another. *Decker Coal Co. v. Commonwealth*
Edison Co., 805 F.2d 834, 843 (9th Cir. 1986).

22 Among the factors considered under §1404(a) are: 1) convenience of
23 witnesses; 2) judicial economy (avoidance of duplicative litigation); 3) relative
24 ease of access to proof; 4) availability of compulsory process to secure witness
25 attendance; 5) relative means of the parties; 6) relative docket congestion; and 7)
26 local interest in having localized controversies decided at home. *Id.* Additional
27 factors are (1) the location where the relevant agreements were negotiated and
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1 executed; (2) the state that is most familiar with the governing law; (3) the
2 plaintiff's choice of forum; (4) the respective parties' contacts with the forum; (5)
3 the contacts relating to plaintiff's cause of action in the chosen forum; and (6)
4 differences in the cost of litigation in the two forums. *Jones v. GNC Franchising,*
5 *Inc.*, 211 F.3d 495, 498-99 (9th Cir. 2000).

6 In general, a plaintiff's choice of forum is accorded substantial weight in
7 §1404(a) proceedings. A transfer will not be ordered unless the "convenience" and
8 "justice" factors strongly favor venue elsewhere. *Securities Investor Protection*
9 *Corp. v. Vigman*, 764 F.2d 1309, 1317 (9th Cir. 1985).

10 11 **A. Contacts With Eastern District of Washington and Eastern District** 12 **of Wisconsin**

13 The specifications for the dental instruments in question, including all molds
14 and the etching process and testing protocols necessary to ensure that the silicone
15 adhered to the substrate base, were designed in Spokane. The marketing analysis,
16 production requirements, and terms of sale and distribution originated in Spokane.
17 An engineer from A.K., Jeff Davis, made one or two visits to ADMT's production
18 facility in Spokane in March 2003, apparently before the parties' written contract
19 was negotiated and executed.

20 The contract between the parties was negotiated and executed in Wisconsin.
21 ADMT executives traveled to Elkhorn, Wisconsin to negotiate the contract and
22 made several visits to Elkhorn thereafter.¹ During the "Generation 2" work which

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24 ¹ In their declarations submitted in response to the Motion To Transfer Venue,
25 former ADMT executives Allan Holms and Troy Mallonee take issue with specific
26 paragraphs (5, 6, 8 and 9) contained in the declaration of Bernie Stritzke that was
27 submitted by A.K. in support of its motion. Significantly, Holms and Mallonee do
28 not dispute the information contained in Paragraph 4 of Stritzke's declaration that
they traveled to Elkhorn, Wisconsin to negotiate and finalize a contract, that the

1 began after August 2005 and which is at issue here, the plastic part of the dental
2 tool handle was manufactured in an A.K. affiliate facility in Monticello, Iowa, and
3 the silicone substrate was bonded to the plastic handle in Elkhorn, Wisconsin.
4 ADMT acknowledges it turned over to A.K. the specifications, molds, and etching
5 process to build the molds used in the silicone overmolding process. After the
6 bonding process was completed in Wisconsin, the handles were sent to Dental USA
7 in McHenry, Illinois for insertion of metal tips.² In 2005, ADMT entered into a
8 relationship with Discus Dental (“Discus”) whereby it agreed to supply completed
9 dental handles to Discus for distribution. The completed handles were shipped
10 directly from Dental USA to Discus for distribution. In May 2006, handles were
11 delivered to Discus which ADMT alleges contained numerous flaws. Discus

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13 contract was negotiated and executed in Wisconsin, and that they visited
14 Wisconsin several more times during the course of the business relationship
15 between ADMT and A.K.. Although it appears Stritzke was not involved in the
16 contracting process because he did not become the general manager of A.K. until
17 early 2006, neither Holms or Mallonee specifically assert the contract was
18 negotiated and executed somewhere other than Wisconsin (i.e., Washington).
19 Considering the detail contained in their declarations and their pointing out of
20 deficiencies in specific paragraphs of the Stritzke declaration, the silence of Holms
21 and Mallonee on these particular matters cannot be ignored.

22 ² In their declarations, neither Holms or Mallonee take issue with Stritzke’s
23 assertion in Paragraph 6 of his declaration that “[d]uring the time period relevant
24 to this lawsuit, the plastic handle of the dental tool was molded at A.K. Rubber
25 plant in Monticello, Iowa; the silicone grip was molded and bonded in Elkhorn,
26 Wisconsin.” Holms and Mallonee assert only that Paragraph 6 is incomplete
27 because it failed to mention that A.K. was required to send batch samples directly
28 to ADMT from each handle run. Furthermore, Stritzke, as general manager of
A.K. in early 2006, would have personal knowledge of the “Generation 2” work
(i.e., the plastic part of the handle being manufactured in Iowa, the bonding
process taking place in Wisconsin, and the insertion of the metal tip taking place
in Illinois).

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1 rejected another shipment of the tools in July 2006. In August 2006, A.K. shipped
2 handles to ADMT's Spokane facility for testing which ADMT alleges revealed
3 flaws in the product. In September 2006, Discus terminated its distribution
4 contract with ADMT because of the alleged flawed products. This precipitated the
5 breach of contract action by ADMT against A.K.

6 Based on the foregoing, the court finds that the majority of the contacts, and
7 the contacts most significant and relevant to this litigation, occurred in Wisconsin
8 and/or in the neighboring states of Iowa and Illinois.

9 10 **B. Alleged Forum Selection Clause**

11 Although ADMT alludes to a possible oral agreement with A.K. regarding
12 selection of a forum for litigation, that being the Eastern District of Washington,
13 apparently no forum selection clause was included in the actual written contract
14 executed by the parties. In any event, forum selection clauses, although a factor for
15 the court to consider, are not controlling in determining whether or not a transfer
16 should be granted. Determination of party and witness "convenience," and
17 "interest of justice" is committed to the court's discretion. *Stewart Org., Inc. v.*
18 *Ricoh Corp.*, 487 U.S. 22, 29-30, 108 S.Ct. 2239 (1988).

19 **C. Governing State Law**

20 Citing Washington's "most significant relationship test" for determining the
21 governing law³, ADMT contends Washington law applies, while A.K. contends
22 Wisconsin law applies. It is not apparent there is a conflict between Washington
23 and Wisconsin law such that a decision needs to be made at this time regarding the
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26 ³ In a diversity case, a federal court applies the choice of law laws of the state in
27 which it sits. *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 847, 61 S.Ct. 1020
28 (1941).

1 governing law in order to assess the weight of this factor in determining whether
2 venue should be transferred. A mere assumption there is a conflict between
3 Washington and Wisconsin law is not enough to justify the court engaging in a
4 choice of law analysis to determine what is likely to be the governing law. "An
5 actual conflict between the law of Washington and the law of another state must be
6 shown to exist before Washington courts will engage in a conflict of law analysis."
7 *Burnside v. Simpson Paper Co.*, 123 Wn.2d 93, 103, 864 P.2d 937, 942 (1994).
8 Because the weight of the other factors, as discussed herein, favor transfer, the
9 Eastern District of Wisconsin will determine if there is a conflict and if so, what the
10 governing law should be regarding the parties' contract.

11 **D. Timing Of Motion To Transfer**

12 The court conducted a scheduling conference in this matter on June 19, 2008
13 and the scheduling order was filed the following day. Pursuant to the order, initial
14 disclosures have been made and ADMT has made expert designations which are
15 subject to a motion to strike filed by A.K., currently noted for hearing without oral
16 argument on January 2, 2009. The discovery deadline is February 17, 2009.
17 ADMT does not dispute that although written discovery has been exchanged, there
18 have been no depositions. No dispositive motions have been filed or ruled upon by
19 the court. Trial is currently set for June 15, 2009.

20 A transfer for convenience should be sought as soon as the "inconvenience"
21 becomes apparent, preferably with or before the first responsive pleading. *SEC v.*
22 *Savoy Industries, Inc.*, 587 F.2d 1149, 1156 (D.C. Cir. 1978). ADMT's complaint
23 was filed March 26, 2008 (Ct. Rec. 1). In its answer, filed May 7, 2008 (Ct. Rec.
24 7), A.K. asserted an affirmative defense that ADMT's choice of venue was
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1 “improper.” While that is not specifically a “convenience” challenge⁴, it certainly
2 indicates A.K. was not persuaded the Eastern District of Washington should be the
3 place where litigation occurred. In the Joint Status Report filed June 17, 2008 (Ct.
4 Rec. 20), A.K. made clear its assertion “that venue is most appropriate in the
5 Eastern District of Wisconsin” and that it intended to file a motion to transfer
6 venue. The motion to transfer was not filed until November 20, 2008, but A.K.
7 says this was due in part to the fact that ADMT’s counsel was out of the country on
8 an extended vacation during the summer months and requested that no motions be
9 filed during that time. A.K. contends the parties also explored settlement and
10 mediation after the June 19 status conference. Although counsel for ADMT cannot
11 recall settlement and mediation being explored, he did not deny that he took an
12 extended vacation and asked that no motions be filed.

13 The court cannot find the delay in filing the motion has caused undue
14 prejudice to ADMT or substantially increased the expense of litigation. Nor has
15 A.K. brought the motion merely as a dilatory practice. *Blumenthal v. Management*
16 *Assist., Inc.*, 480 F.Supp. 470, 471 (N.D. Ill. 1979). This is evident from the
17 limited amount of litigation that has occurred so far in this case, and the substantial
18 amount of litigation that remains, short of the case being settled.

19 **E. Convenience of Witnesses**

20 Although ADMT contends the majority of witnesses are from Spokane, this
21 is based only on the proof it believes necessary to make its case. A.K. contends the
22 vast majority of its witnesses are located in and around Wisconsin, including those
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25 ⁴ Improper venue requires dismissal or transfer pursuant to 28 U.S.C. Section
26 1406(a), whereas a motion for “convenience” transfer under Section 1404(a) is
27 discretionary because venue is already proper in the district from which a transfer
28 is sought.

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1 located in Monticello, Iowa, and those associated with Dental USA in McHenry,
2 Illinois. At this juncture, the court cannot discount A.K.'s assertion that the Dental
3 USA witnesses are material to this litigation. The court concludes the majority of
4 the witnesses (whether party or non-party) are located in or around Wisconsin and
5 are either subject to the subpoena power of the Eastern District of Wisconsin (Fed.
6 R. Civ. P. 45⁵) or are located within a relatively short driving distance of that
7 district. Other potential witnesses located either in California, New Mexico, or
8 Arizona will have to travel by air, whether the litigation occurs in Washington or
9 Wisconsin. It is doubtful that traveling to Wisconsin instead of Washington would
10 cause them any additional inconvenience.

11 **F. Ease of Access to Sources of Proof**

12 ADMT asserts virtually all of the witnesses to the contract with knowledge
13 of the etching and manufacturing processes created by ADMT are located in
14 Spokane, as is all of the supporting documentation, including the original molds
15 and specifications, as well as the results of the final autoclave testing. There is no
16 dispute, however, that the molds used in the actual manufacturing of the handles, at
17 issue here, are located in Wisconsin. Although these molds may have originally
18 been sent to Arizona and used there as part of the "Generation 1" work, they were
19 later sent to Wisconsin, sometime after August 2005.⁶ It is this "Generation 2"
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21 ⁵ Fed. R. Civ. P. 45(b)(2) allows service of a subpoena at any place without the
22 district that is within 100 miles of the place of deposition, hearing, trial,
23 production, or inspection specified in the subpoena, or at any place within the state
24 where a state statute or rule of court permits service of a subpoena issued by a
25 state court of general jurisdiction sitting in the place of the deposition, hearing,
26 trial, production or inspection specified in the subpoena.

27 ⁶ It is of no significance that A.K., instead of ADMT, transferred the molds
28 from Arizona to Wisconsin. ADMT agreed to the "Generation 2" work and it was

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1 work and the bonding process which occurred in Wisconsin that is at the heart of
2 the dispute between ADMT and A.K.⁷ Therefore, the court concludes the most
3 relevant physical evidence is located in Wisconsin. Moreover, the court agrees
4 with A.K. that relevant documents can just as easily be produced in Wisconsin as in
5 Washington.

6 7 **III. CONCLUSION**

8 A plaintiff's choice of forum is accorded substantial weight in proceedings
9 under § 1404(a) and courts generally will not order a transfer unless the
10 "convenience" and "justice" factors strongly favor venue elsewhere. *Securities*
11 *Investor Protection Corp.*, 764 F.2d at 1317. Because plaintiff's choice of forum is
12 entitled to deference, the moving party, usually the defendant, has the burden of
13 showing that "the convenience of the parties and the witnesses" and the "interest of
14 justice" requires transfer to another district. *Commodity Futures Trading Comm'n*,
15 611 F.2d at 279. A transfer will not be ordered if the result is merely to shift the
16 inconvenience from one party (defendant) to another party (plaintiff). A transfer
17 should only be ordered when the transferee forum is clearly more convenient. *In re*
18 *Volkswagen of America, Inc.*, 506 F.3d 376, 385 (5th Cir. 2007).

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20 pursuant to that agreement that the molds ended up in Wisconsin.

21 ⁷ ADMT contends completed production runs of the handles were sent to
22 Washington. The invoices which it has submitted in support of that assertion date
23 from February and October 2004, during "Generation 1" work. The handles at
24 issue in this contract dispute were manufactured during "Generation 2" and
25 although samples of the work may have been sent to Spokane for autoclave
26 testing, ADMT does not assert that completed production runs of those handles
27 were sent directly to Spokane, as opposed to directly to Discus in California. In
28 their declarations, former ADMT executives Allan Holms and Troy Mallonee state
that A.K. was required to send "batch samples" from each handle run directly to
ADMT in Spokane so that ADMT could do secondary quality control.

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1 Based on its consideration of the factors set forth above, the court concludes
2 A.K. has met its burden of showing that “the convenience of the parties and the
3 witnesses” and the “interest of justice” requires transfer to another district. The
4 Eastern District of Wisconsin is “clearly” a more convenient forum.

5 In arriving at this conclusion, the court has relied upon the undisputed facts
6 it has gleaned from a comparison of the Stritzke declaration with the declarations
7 of Holms and Mallonee (see footnotes 1 and 2 *supra*), in addition to the undisputed
8 facts the court has gleaned from the parties’ memoranda and the oral argument
9 presented by counsel. Defendant’s Motion To Strike The Declaration of Bernie
10 Stritzke (Ct. Rec. 47) is **DENIED**. The court has not considered the Collopy
11 declaration and therefore, the motion to strike that declaration (Ct. Rec. 63) is
12 **DISMISSED as moot**.

13 Defendant’s Motion To Transfer Venue (Ct. Rec. 25) is **GRANTED** and the
14 captioned action is transferred to the Eastern District of Wisconsin. Defendant’s
15 Motion To Strike Plaintiff’s Expert Designations (Ct. Rec. 29), and Plaintiff’s
16 Motion To Amend/Correct Complaint (Ct. Rec. 40) should be re-noted for hearing
17 before the U.S. District Court for the Eastern District of Wisconsin. The
18 scheduling order filed in the captioned matter (Ct. Rec. 23) is vacated.

19 **IT IS SO ORDERED.** The District Executive is directed to enter this order
20 and forward copies to counsel of record. Along with the file, a copy of this order
21 shall be forwarded to the District Executive for the Eastern District of Wisconsin.

22 **DATED** this 31st of December, 2008.

23 *s/Lonny R. Suko*

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LONNY R. SUKO
United States District Judge

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